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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1197

RUDOLPH FLANDERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OSCAR B. GOODMAN
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101

FLOYD M. BUFORD, ESQ.
P. O. Box 755
Macon, Georgia 31202

Counsel for Petitioner
RUDOLPH FLANDERS

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	4
The United States Was Divested of Jurisdiction Over the Offense by Virtue of the Shipment Having Come To Rest in the State of Georgia, Its Final Destination	4
CONCLUSION	6
CERTIFICATE OF SERVICE	7
APPENDIX A – Opinion Below	1a
APPENDIX B – Judgment Below	1b
APPENDIX C – Statute Involved	1c

TABLE OF AUTHORITIES

Cases:

O'Kelley v. United States, 116 F.2d 966 (8 Cir., 1941)	5
Rewis v. United States, 401 U.S. 803	6
United States v. Cousins, 427 F.2d 382 (9 Cir., 1970)	5
United States v. Maze, No. 72-1168, 14 Cr.L. 3070	6

Statutory Provisions:

18 U.S.C. Section 409	5
18 U.S.C. Section 659	2, 4, 5
28 U.S.C. Section 1254(1)	2

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The Petitioner Rudolph Flanders respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 4, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The judgment of conviction entered by the United States District Court for the Middle District of Georgia following a trial by

jury, as it appeared at page 213 of the appendix to the brief of Petitioner filed on appeal in the United States Court of Appeals for the Fifth Circuit, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 4, 1974. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the Untied States was divested of jurisdiction over the offense by virtue of the shipment having come to rest in the State of Georgia, its final destination and thus losing its character as an interstate shipment.

STATUTE INVOLVED

Title 18 United States Code, Section 659.

The text of the Statute appears in the Appendix hereto.

STATEMENT OF THE CASE

The United States brought this criminal proceeding by means of a one-count indictment charging the Petitioner with possession of chattels, to-wit, beef, of a value in excess of $100.00 knowing the same to have been embezzled and stolen while moving as, a part of, and constituting an interstate shipment (18 U.S.C. 659).

Following a trial by jury the Petitioner was found guilty of the unlawful possession of chattels of a value less than $100.00 and sentenced to imprisonment for a period of one (1) year and fined $1,000.00.

On appeal to the Fifth Circuit Court of Appeals, Petitioner presented several issues for review but did not raise the issue presented herein. Petitioner submits herein that the issue presented in this petition raises a question of jurisdiction and therefore should be considered by this Honorable Court.

At the trial of Petitioner the testimony showed that at the time the beef left the Hormel Company plant in Fremont, Nebraska, the consignor (Hormel) had nothing further to do with the shipment, the consignee (Alterman Foods, Inc.) and the carrier were one in the same and had title, possession and control of the shipment and at the time of the theft, the shipment had reached the State of Georgia, its final destination.

During the trial, one Joe Wilkins, Transportation Distribution Manager for the George A. Hormel Company of Fremont, Nebraska, testified that on March 30, 1972, Hormel Company sold 33,224.1 pounds of beef to Alterman Foods, Inc. of Atlanta, Georgia. Alterman Foods, Inc. had sent their own trailer to Fremont, Nebraska, to pick up the beef and return it to Atlanta, Georgia. Once the beef was loaded into the trailer at the Hormel Company plant in Fremont, Nebraska, the beef belonged to Alterman Foods, Inc. and the Hormel Company had nothing else to do with the beef and was not responsible for any costs of shipping.

One Bobby Lee Reec then testified that he was sent to Fremont, Nebraska, as the driver of a truck and trailer to pick up a load of beef for Alterman Foods, Inc. and return it to Atlanta, Georgia. Mr. Reec was a substitute driver for a B. Moseley. Both men worked for the man who leased the truck to Alterman Foods, Inc., who owned the trailer which contained the beef.

Mr. Reec testified that he picked up the beef in Fremont, Nebraska, and then drove to Atlanta, Georgia,

leaving Fremont on Friday and arriving in Atlanta about two or two-thirty on Saturday morning. Mr. Reec left the truck and trailer and returned about daylight on Saturday morning and turned the keys over to Mr. Moseley. The trailer was still loaded with beef when Mr. Reec gave the keys to Mr. Moseley.

Mr. Vernon Richards, the owner of the truck, testified that he had leased the truck to Alterman Foods, Inc. and that when Reec called him and reported that he had arrived back from Nebraska he, Richards, sent Mr. Moseley to meet Reec. According to Richards' testimony, Moseley was "going to get the meat out and everything, the bills out and everything and fix them all up and I was going to pay the expense money."

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction with a two sentence per curiam decision. On January 29, 1974, the Court of Appeals stayed the issuance of the mandate and Petitioner remains at liberty on his $10,000.00 appeal bond.

REASON FOR GRANTING THE WRIT

THE UNITED STATES WAS DIVESTED OF JURISDICTION OVER THE OFFENSE BY VIRTUE OF THE SHIPMENT HAVING COME TO REST IN THE STATE OF GEORGIA, ITS FINAL DESTINATION.

The Petitioner was charged with what amounted to the common law crime of possession of stolen property but was prosecuted by the United States pursuant to 18 U.S.C. 659 which makes Petitioner's acts a federal crime when the stolen goods are moving as, a part of, or constitute an interstate shipment. Common law larceny offenses are not federal crimes and can become such only when the property taken is part of interstate commerce.

O'Kelley v. United States, 116 F.2d 966 (8 Cir., 1941). In *O'Kelley*, an analogous factual situation was presented for review and the Court reversed the convictions which were brought pursuant to 18 U.S.C. 409, a predecessor to 18 U.S.C. 659. *O'Kelley* involved a shipment by rail of sugar from Louisiana to Ravana, Arkansas. After the railway car was set out on a spur truck at Ravana, Arkansas and turned over to the consignee, a quantity of the sugar was stolen by O'Kelley and another. The Court in reversing O'Kelley's conviction held that the shipment of sugar involved had lost its interstate character and thus was not within the purview of the Federal Statute.

The test to determine whether a shipment is in interstate commerce at a given time has been recently stated in *United States v. Cousins*, 427 F.2d 382 (9 Cir., 1970). In *Cousins*, the Court stated the determination is essentially a practical one, "depending upon the relationship between the consignee, consignor, and carrier, the indicia of interstate commerce at the time the theft occurs, and the preservation of the congressional intent." 427 F.2d at 385.

In *Cousins*, the "theft occurred before the consignee accepted the shipment at a time when the railroad car was under seal on a track being patrolled by railroad agents." 427 F.2d at 385.

The facts presented herein are clearly in line with *O'Kelley, supra*, in that at the time the beef left the Hormel Company plant in Fremont, Nebraska, the consignor (Hormel) had nothing further to do with the shipment, the consignee (Alterman Foods, Inc.) and the carrier were one in the same and had title, possession and control of the shipment and at the time of the theft, the shipment had reached the State of Georgia, its final destination.

Petitioner submits that the shipment of beef which was the target of a theft had come to rest at its destination and had an insufficient nexus with interstate activities to give rise to federal jurisdiction. *Rewis v. United States*, 401 U.S. 803; *United States v. Maze*, No. 72-1168, 14 Cr.L. 3070.

CONCLUSION

For the reason stated, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

OSCAR B. GOODMAN, ESQ.
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101

Attorney for Petitioner
RUDOLPH FLANDERS

CERTIFICATE OF SERVICE

It is hereby certified that 3 true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 4th day of February, 1974, postage prepaid, to the Honorable ROBERT BORK, Solicitor General, U.S. Department of Justice, Washington, D.C. 20530.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73-2650
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUDOLPH FLANDERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(January 4, 1974)

Before BELL, GODBOLD, and GEE, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1] Appellant was convicted on a charge of possessing beef stolen from an interstate shipment. 18 USCA, § 659. The evidence was sufficient to warrant the verdict of guilty and we find no merit in any of the other assignments of error.

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*Rule 18, 5 Cir.: see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

JUDGMENT AND COMMITMENT

(Number and title omitted)

On this 29th day of June, 1973 came the attorney for the government and the defendant appeared in person and by employed counsel,

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty, has been convicted of the offense of 18 USC 659, knowingly possessed stolen chattels of a value less than $100.00, which chattels had been stolen while moving in interstate commerce, as charged in Count 1, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWELVE (12) MONTHS, or until he is otherwise discharged as provided by law, and that defendant shall pay a fine to the United States in the sum of ONE THOUSAND ($1,000.00) DOLLARS.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

At Macon, Georgia.

/s/ Wilbur D. Owens, Jr.
United States District Judge.

APPENDIX C

§659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or

chattels, knowing the same to have been embezzled or stolen–

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as

indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

As amended May 24, 1949, c. 139, §13, 63 Stat. 91; Oct. 14, 1966, Pub.L. 89-654 §1(a)-(d), 80 Stat. 904.

No. 73-1197

MICHAEL RODAK, JR.,

In the Supreme Court of the United States

OCTOBER TERM, 1973

RUDOLPH FLANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

No. 73-1197

MICHAEL RODAK, J

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSTION

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of possessing goods stolen from interstate commerce, knowing the goods to have been stolen, in violation of 18 U.S.C. 659.[1] He was sentenced to imprisonment for one year and was fined $1,000. The court of appeals affirmed (Pet. App. 1a).

1. Petitioner's sole contention is that the evidence was insufficient to show that the goods were in interstate commerce at the time they were stolen. As he acknowledges (Pet. 3), however, this contention was not made

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[1]The indictment charged that petitioner unlawfully possessed a quantity of beef worth in excess of $100. The maximum penalty for that offense is a fine of $5,000 and imprisonment for 10 years. Petitioner was convicted, however, of the lesser included offense of unlawfully possessing goods worth $100 or less, for which the maximum penalty is a fine of $1,000 and imprisonment for one year.

in the court of appeals. "Only in exceptional cases will this Court review a question not raised in the court below" (*Lawn* v. *United States*, 355 U.S. 339, 362, n. 16). Petitioner has shown no such exceptional circumstances in this case.

He asserts, however, that "the issue presented in this petition raises a question of jurisdiction and therefore should be considered" (Pet. 3). His theory, presumably, is that no federal offense was committed if the goods were stolen after they had lost their interstate character. But the test of jurisdiction is whether the indictment charges a federal offense, not whether the evidence proves it beyond a reasonable doubt. *E.g.*, *United States* v. *Perea*, 413 F. 2d 65, 67 (C.A. 10), certiorari denied, 387 U.S. 945. The indictment in this case charged that petitioner possessed goods "which had been embezzled and stolen while [they] * * * were moving as, were a part of, and constituted an interstate shipment" (C.A. App. 1).[2]

Since the indictment properly charged an offense under 18 U.S.C. 659, the district court had subject matter jurisdiction. Petitioner's contention that the proof did not establish an essential element of the offense relates only to the sufficiency of the evidence, not to the district court's jurisdiction over the case. This Court therefore need not consider the contention raised for the first time in the petition for a writ of certiorari.

2. The contention is, in any event, without merit. The evidence showed that the George A. Hormel Company

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[2]"C.A. App." refers to the appendix filed in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

shipped 527 boxes of meat from Fremont, Nebraska, to Alterman Foods, Inc., in Atlanta, Georgia (C.A. App. 9-10, 17). Bobby Lee Reec, driving a tractor leased to Alterman, picked up the trailerload of meat at the Hormel plant in Nebraska and drove it to a truck stop in Atlanta. He arrived at the truck stop at about 2:00 A.M. on April 1, 1972 (*id.* at 32-37, 46-48).

At about 10:00 A.M. that day, Reec transferred the truck keys and the bills of lading to Byron Moseley, the regular driver for whom Reec was substituting (*id.* at 37, 43, 47, 53-54). At the time of the transfer, the seal was still intact on the trailer (*id.* at 37). Mosely intended to drive the tractor-trailer to the Alterman warehouse the following morning (*id.* at 55). The tractor-trailer was stolen from the truck stop during the afternoon of April 1, 1972 (*id.* at 43-45, 49).

The shipment had not yet completed its interstate journey at the time it was stolen. Though it had arrived in Georgia, it had not reached its final destination, the Alterman warehouse, and the seal on the trailer had not yet been broken. In these circumstances, the jury properly found that the shipment was in interstate commerce at the time of the theft. *United States* v. *Astolas*, 487 F. 2d 275 (C.A. 2), certiorari denied April 22, 1974, Nos. 73-1057 and 73-1058; *United States* v. *Cousins*, 427 F. 2d 382 (C.A. 9); *Chapman* v. *United States*, 151 F. 2d 740 (C.A. 8).[3]

It does not matter whether "the consignee * * * and the carrier were one in [*sic*] the same" (Pet. 5). "It is settled law * * * that carriage of the property

[3] *O'Kelley* v. *United States*, 116 F. 2d 966 (C.A. 8), relied on by petitioner (Pet. 5), is inapposite. In *O'Kelley* the goods in question had already been delivered to the consignee and the seal on the railroad car had been broken before the theft occurred.

by the owner does not put the property outside of the protection of Section 659" (*United States* v. *Astolas, supra,* 487 F. 2d at 280). The same standards for determining whether a shipment is in interstate commerce "appl[y] whether or not a separate common or contract carrier is involved" (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

DOJ-1974-04